

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.  
04-10319-WGY

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

NOEL HERNANDEZ

\* \* \* \* \*

TRIAL TRANSCRIPT  
(Excerpts)  
(Volume 7)

BEFORE: The Honorable William G. Young,  
District Judge, and a Jury

APPEARANCES:

DAVID TOBIN and NANCY RUE, Assistant United  
States Attorneys, 1 Courthouse Way, Suite 9200,  
Boston, Massachusetts 02210, on behalf of the  
Government

LAW OFFICES OF PARTRIDGE, ANKNER &  
HORSTMANN, LLP (By Peter C. Horstmann, Esq.),  
200 Berkeley Street, 16th Floor, Boston,  
Massachusetts 02116, on behalf of the Defendant

GABRIEL HADAD and DEBORAH HUACUJA, Court  
Interpreters

22

23

24

1 Courthouse Way  
Boston, Massachusetts

25

July 26, 2005

2

1

PROCEEDINGS - 3:30 P.M.

2

3

ease

THE CLERK: All rise. Court is in session, pl

4

be seated.

5

May I have the question.

6

THE COURT: Yes. Why isn't the answer yes, Mr

7

has

Tobin? I mean, that's what you charged. Of course he

8

to know in both cases.

9

nable

Is there -- suppose, suppose they have a reaso

10

doubt that he knew it was heroin. Do either of these

11

charges survive?

12

MR. TOBIN: Yes, your Honor, I believe they do

13

THE COURT: Tell me. Why? How?

14

MR. TOBIN: They have to -- he has to know tha

t he

15 is transporting a controlled substance. He doesn't hav  
e to

16 know that it is heroin.

17 THE COURT: Well, he's certainly, he's certain  
ly

18 going to be acquitted on the conspiracy.

19 MR. TOBIN: Oh, I would respectfully disagree.

20 THE COURT: You charged heroin.

21 MR. TOBIN: The United States did charge heroi  
n

22 because heroin is in fact what it was. I believe he ha  
s to

23 have knowledge that there is --

24 THE COURT: What's your authority for that?

25 MR. TOBIN: I don't have any authority right n  
ow.

3

1 THE COURT: No, I'm going to charge them what  
he --

2 am I committing error here?

3 MR. HORSTMANN: Absolutely not, your Honor.

4 THE COURT: Especially with the sentencing

5 structure the way we have with mandatory minimums and a

11

6 different sentences for different drugs. Take, take  
7 conspiracy, which is the easiest, at least for my analy  
sis.  
8 It's got to be a specific intent here. And the specifi  
c  
9 intent is to enter into a heroin conspiracy.

10 Now -- oh.

11 (Whereupon the court interpreters entered the  
12 courtroom.)

13 THE CLERK: I forgot to wait for them.

14 THE COURT: I'm sorry.

15 MR. TOBIN: Oh, I'm sorry. I should have wait  
ed.

16 THE COURT: No, it's not -- I'm the one who's  
at  
17 fault. No, we started in your absence and I apologize.  
I  
18 do apologize. The matter is of no moment because we ar  
e  
19 talking about the law.

20 Well, you brief it.

21 Now, aiding and abetting, that's a little hard  
er.

22 You don't have any authority either, do you? It's sort  
of  
23 left to my judgment. It isn't left to my judgment, bec  
ause

24 I imagine there's law on this. But it seems to me that

he

25 has to share the same criminal intent as the offenders,  
the

4

1 other, Navarro, anyway, and they're swallowing pellets  
of  
2 this stuff.

3 Now, you can do that with heroin. I think tha  
t  
4 would be pretty tricky to do it with cocaine because th  
e  
5 stuff will kill you if it -- it happens all the time yo  
u  
6 say.

7 MS. RUE: It happens all the time.

8 MR. TOBIN: I just, I just sentenced a cocaine  
9 swallower 20 minutes ago.

10 THE COURT: Respectfully, Mr. Tobin, you didn'  
t  
11 sentence him.

12 MR. TOBIN: I'm sorry. I apologize. I was pr  
esent  
13 at the sentencing --

14 THE COURT: You urged a sentence.

15 MR. TOBIN: -- in the United States District C  
ourt.

16 I apologize.

17 THE COURT: All right, it seems to me that we'

18 got to know what it was here. Not just that it was som

19 sort of drug.

20 Let's, let's look at the -- what's the specifi

21 before I commit error here, what's the specific charge

22 the importation of, what is the language of --

23 MS. RUE: I believe it's 963.

24 THE COURT: 963? 18 U.S. 963?

25 MS. RUE: 21, your Honor.

5

1 THE COURT: 21 U.S.C. 963.

2 MS. RUE: And I'm afraid I was in on another c

3 so I actually have that case's file in front of me.

4 THE COURT: That's all right. 963. Well, tha

5 just a general attempt and conspiracy. Any person --

6 MS. RUE: 952 then.

7 THE COURT: All right, we'll try that.



8 MS. RUE: 952, importation, your Honor.

9 MR. HORSTMANN: (A) is Schedule I or II contro

lled

10 substances.

11 MS. RUE: And since heroin is I and cocaine is  
II,

love

12 I believe if they believed it was either one. I would

13 an opportunity to do 15 minutes worth of research, your

14 Honor.

15 THE COURT: No, I'll give you that opportunity

s

16 Ten minutes of 4:00 I'll instruct them. My intention i

17 to -- and I'll go look it up myself.

18 MS. RUE: Thank you, your Honor.

19 MR. HORSTMANN: Thank you, your Honor.

20 THE COURT: Ten minutes of 4:00. We'll recess

have

21 MR. HORSTMANN: Judge, may Mr. Hernandez just

22 the note translated for him because I'm not sure he

23 understood --

, the

24 THE COURT: He certainly may. Now, understand

25 conspiracy -- to me I see them differently.

1 MR. TOBIN: Yes.

2 THE COURT: So authority with respect to consp

3 as well as authority with respect to the specific doing  
it.

4 Thank you.

5 MR. TOBIN: Thank you, your Honor.

6 THE CLERK: And you'll just wait -- all rise.

7 (Recess.)

8

9

10 PROCEEDINGS - 3:53 P.M.

11

12 THE CLERK: Court is in session, please be sea  
ted.

13 THE COURT: Well, Ms. Rue, what do you have?

14 MS. RUE: Your Honor, First Circuit versus --

15 THE COURT: Well, may I have it. I would like  
the

16 actual language here. Telling me about cases is going  
to be

17 less helpful than my reading them.

18 MS. RUE: Okay. Thank you, your Honor.

19 THE COURT: I'm not against oral argument but  
this



20 is the type of thing --

21 MS. RUE: And, your Honor, I would also submit  
from

22 the Ninth Circuit US v. Toliver, 331F.3d 423.

23 MR. HORSTMANN: Judge, I have two First Circui  
t

24 cases here as well.

25 THE COURT: Yes. Do you have them?

7

1 MR. HORSTMANN: Yes.

2 THE COURT: May I see it.

3 MS. RUE: And, your Honor, I would also submit  
US

4 v. Hussein.

5 THE COURT: And now can you give me some help  
as to

6 where in Hussein? The --

7 MS. RUE: Your Honor, I believe it was the fif  
th

8 head note. The reference is that the defendant need no  
t

9 know specifically what the controlled substance is, onl  
y

10 that it is a controlled substance. And in the Hussein  
case

11 he asserted that he did not know that it was CAT, was  
12 unfamiliar with CAT.

13 THE COURT: All right, let's see here.

14 And turning to your cases, Mr. Horstmann. Wha  
t's

15 the --

16 MR. HORSTMANN: Unfortunately, your Honor, I d  
idn't

17 get past the head notes, but I think the two head notes  
you

18 are dealing with are those that deal with constructive  
19 amendment of indictments.

20 THE COURT: Yes, that's --

21 MR. HORSTMANN: And variance.

22 THE COURT: Yes. All right.

23 MR. HORSTMANN: Those two First Circuit cases  
24 clearly say that constructive amendment of the terms of  
the

25 indictment by the prosecution or the Court is per se

8

1 unconstitutional. Unconstitutional. Excuse me.

2 THE COURT: Yes, that was troubling to me. Bu  
t

3 your point is -- let's tease that out a little bit.

4 On the, on the conspiracy -- none of these cas  
es  
5 are conspiracy. So, on conspiracy, Ms. Rue, I'm sticki  
ng to  
6 my guns. They have to know it's heroin. But on the  
7 importation here, I'm much less certain on importation.

8 And so your point is that if, having alleged  
9 heroin, which they clearly alleged, that's what they al  
lege  
10 here, importation of heroin, they cannot now say any  
11 Schedule I or II controlled substance.

12 MR. HORSTMANN: Absolutely not, your Honor. I  
13 think the indictment is clear, clear, it says heroin, i  
n  
14 multiple places. Even assuming, if this is not a  
15 constructive amendment of the terms, it's certainly  
16 prejudicial variance. There's no notice to this defend  
ant  
17 that this was going to be a cocaine, either conspiracy  
or  
18 prosecution for the substantive possession of cocaine.  
So I  
19 think under either theory, although I think it's more  
20 closely a constructive amendment, I don't see how the C  
ourt  
21 can answer the question no.

22 MS. RUE: Your Honor, may we be heard?

23 THE COURT: Yes.

24 MS. RUE: I would like permission to come back  
to  
25 the question of conspiracy.

9

1 With regard to the constructive amendment, you  
r  
2 Honor, the Ninth Circuit case that I presented deals  
3 especially with that and in that case, your Honor --

4 THE COURT: I know, but I'm not persuaded by t  
he  
5 Ninth Circuit, candidly. I've looked at the case. I'm  
not  
6 persuaded.

7 MS. RUE: May I address with regard to conspir  
acy  
8 generally, your Honor?

9 THE COURT: Go ahead.

10 MS. RUE: Your Honor, when you look at the  
11 conspiracy statute itself, 963, the words in that statu  
te, a  
12 person who attempts or conspires to commit any offense  
13 defined in this subchapter shall be subject to the same  
14 penalties as those prescribed for the offense, the  
15 commission of which was the object of the attempt or th

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e

16 conspiracy.

17 Therefore your Honor, if the law covers the

do

18 underlying offense then the fact that they conspired to

ense.

19 it, they had an agreement to violate the underlying off

ve to

20 If you don't have to be more specific in the underlying

21 offense, your Honor, I respectfully submit you don't ha

22 be --

age

23 THE COURT: But my problem is the actual langu

24 of your indictment. If I were to adopt that -- and

n of

25 remember, you accepted, without cavil here, the excisio

10

1 the business that he had cocaine in his wallet. We

2 stipulated, no, it's an unrelated offense. If he's a

ve it

3 full-service drug dealer here why that would be probati

t

4 would seem to me. This is a person who knows how to ge

out

5 cocaine. Maybe he knows how to deal cocaine. But no,

6 that went without any objection from the government bec

ause

7 we were talking about heroin here.

t was

8 MS. RUE: Your Honor, I don't believe that tha

9 the basis of our not objecting.

the

10 THE COURT: No, but whether or not it was the  
11 basis, that's the record here. That's what happened in

12 case. The whole focus has been on this heroin.

on

13 It seems to me this. I'm sticking to my guns

I

14 conspiracy. Conspiracy is a specific intent crime. I,

s to

15 will let it go as to the doing of it, saying that it ha

be

16 be heroin or cocaine, it isn't just any controlled

17 substance. And one of the reasons I'm doing it, let's

m,

18 very clear, one of the reasons I'm doing it is that I a

ct of

19 I'm doing it that way, is that I am gravely troubled by  
20 expanding the indictment. Therefore, if we get a verdi

21 guilty on Count 1, not guilty on Count 2, no amount of

22 heroin, because they, they had a reasonable doubt as to

23 whether it is heroin, Question 4 has nothing to do with

24 this, then, then we'll be in a position, I think that's



25        fairest to the government, because then we'll be in a

11

I        1        position to address this issue of fatal variance, which  
his.     2        take very seriously. I think maybe you have expanded t

's,     3            Now, if you get a guilty on both I think there  
e        4        no error has been made; if it's a not guilty on both, w  
5        don't have the issue.

Bring   6            That's how I'm going to answer the question.  
7        the jury in.

ou're   8            MR. HORSTMANN: Judge, I, I object. I think y  
isk     9        sort of experimenting with the jury. And you run the r  
they   10       when you do that that, you know, if they convict on one  
nk     11       decide that they're going to convict on all. And I thi  
12       that's the risk you're taking here. I think the law is  
13       quite clear, this is a constructive amendment or a  
14       prejudicial variance.

15            THE COURT: I haven't allowed you to -- strike

16 that. I am not overruling those arguments. I'm procee  
ding

17 in this fashion.

18 All right, bring the jury in.

19 (Pause in proceedings.)

20 MS. RUE: Your Honor?

21 THE COURT: Yes.

22 MS. RUE: Would the Court consider giving us  
23 additional time to brief this matter before tomorrow  
24 morning?

25 THE COURT: No, I'm going to answer the questi  
on.

12

1 The jury needs an answer to the question and I'm going  
to  
2 answer them.

3 Now, once I send them out it sort of moots the  
4 issue, but you might well research it because if they c  
ome

5 back with a related question I could address it further

6 But they will have to come back with some related quest  
ion.

7 MS. RUE: Thank you, your Honor.

8 (Further pause in proceedings.)

9 THE CLERK: All rise for the jury.

10 (Whereupon the jury entered the courtroom at 4

11 p.m.)

12 THE CLERK: Court is in session, please be sea

13 THE COURT: Let the record show that --

14 A JUROR: We're missing someone?

15 THE COURT: Oh, we are?

16 A JUROR: No, they're over there. Okay. I'm

17 sorry.

18 THE COURT: No, never hesitate. You did just

19 right.

20 Let the record show that the twelve deliberati

21 jurors and the two alternates are present in the courtr

22 I've received the following questions which I'

23 read:

24 For either charge does the defendant have to h

25 knowledge of what specifically is coming into the count

1 Does he have to know what drug it is? Is the charge  
2 specifically heroin or any drug?

3 Are those the questions, Madam Forelady?

4 THE FORELADY: Yes, your Honor.

5 THE COURT: Are those the questions, ladies and  
6 gentlemen of the jury?

7 THE JURY: Yes.

8 THE COURT: To those questions I make these  
9 answers. That's the formal way of doing it.

10 You'll see I didn't call you right back in. And  
11 that's because this is a very good question. To your  
12 questions, I make the following answers.

13 Look at Question 2 first. Question 2 deals with  
14 conspiracy. In order for there to be a conspiracy there  
15 has to be an agreement as I have already charged you, and there  
16 has to be a specific intent, a specific goal of the  
17 agreement. As the government has charged it here, the  
18 specific goal of the agreement as they charged it is to  
19 import heroin. So that's got to be the deal. The  
20 government has to prove that his agreement was with one  
or

21 more of these other folks to import heroin. Not any dr

22 heroin.

23 As to the first question, the answer is a litt

24 more complex. The government charged the importation o

25 heroin. But when you look at the underlying statute, t

14

1 law, it talks about the importation of any substance un

2 Schedule I or II. Now, that's not any drugs. That's h

3 or cocaine. So, for that charge, if he aided or abette

4 that charge, or he did conspire but his conspiracy was

5 either heroin or cocaine, then you might find him guilt

6 that charge.

7 Assume that you have a reasonable doubt as to

8 whether he knew it was heroin, but you are satisfied be

9 a reasonable doubt that he either aided and abetted Nav

10 and Mercedes in bringing in a controlled substance that

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m to 11 either heroin or cocaine, or that he conspired with the  
or 12 bring in a controlled substance that was either heroin  
not 13 cocaine. Then you could find him guilty on Count 1 but  
you 14 guilty on Count 2. Don't answer Count 3, it only asks  
ing 15 about quantities of heroin, and you haven't asked anyth  
16 about Question 4.

17 Again I say to you, I'm just answering your  
18 questions. A logical verdict in this case is that Mr.  
ilty 19 Hernandez is not guilty on both counts or that he is gu  
lty 20 on both counts or he is not guilty on the first and gui  
21 on the second. In other words, it's what you determine  
22 generally. I'm not changing anything that I said.

23 That's my answer to your question. You may --  
24 questions. You may retire and continue your deliberati  
ons. 25

THE CLERK: All rise for the jury.

15

1 (Whereupon the jury left the courtroom at 4:08



2 p.m.)

3 THE COURT: We'll recess.

4 (Recess.)

5

6 PROCEEDINGS - 4:53 P.M.

7

8 THE CLERK: All rise. Court is in session, pl

ease

9 be seated.

10 THE COURT: I have two other questions which y

ou've

11 seen. The questions are sufficiently similar and given

the

12 hour I'm not going to answer them, and instead I'm goin

g to

13 send the jury home.

14 If anyone wants to brief any of these issues,

I

15 want briefs before nine o'clock tomorrow morning. Ms.

Smith

16 will see that I get them. I will have reviewed them.

I'll

17 answer the question at nine o'clock, questions at nine

18 o'clock and we'll go from there.

19 All right, bring the jury in.

20 (Pause in proceedings.)

21 THE CLERK: All rise for the jury.

22 (Whereupon the jury entered the courtroom at 4  
:55  
23 p.m.)  
24 THE CLERK: Court is in session, please be sea  
ted.  
25 Let the record show that the twelve deliberati  
ng

16

1 jurors and the two alternates are present in the courtr  
oom.  
2 I have received two additional questions. But  
in  
3 view of the hour, and because I believe I ought not cro  
wd  
4 people with respect to a verdict, I told you we would s  
top  
5 at 5:00. We're going to stop at 5:00. I will answer t  
he  
6 questions, but I'll answer them at nine o'clock tomorro  
w  
7 morning. And so I brought you in to give you your  
8 instructions now that we're going to disperse.  
9 I can no longer say keep your minds suspended  
10 because you twelve deliberating jurors are well into yo  
ur  
11 deliberations concerning the substance of these charges

y  
12 That fact makes so vitally important the remainder of m  
13 cautions. No doing any independent research about this  
14 case. The case is all before you now on the evidence.  
is  
15 Don't talk to anyone about the substance of th  
16 case in any way, shape, manner or form. Don't the  
nates  
17 deliberating jurors talk to the alternates or the alter  
her  
18 to the deliberating jurors or the alternates to each ot  
19 about the substance of the case.  
11  
20 Once I let you go now, since the alternates wi  
21 all go with you, don't keep on talking about the case.  
When  
22 you come in in the morning the alternates will go to th  
e  
23 jury room and be with you. Don't you talk about the ca  
se.  
24 At nine o'clock I will bring you into the courtroom, an  
d so  
25 vital is this that on your oath as jurors I will ask yo  
u

17

1 whether you have obeyed my instructions.

2 The integrity of this whole process now depend  
s  
3 upon you keeping the deliberations, whatever they may b  
e,  
4 entirely to yourself. No one is to be consulted. Don'  
t  
5 talk to anyone about the substance of the case.

6 I have seen no press about this case, but  
7 frequently when a case is under deliberations the press  
8 wants to run something about that. Should there be any  
thing  
9 in the press, radio, television, newspaper, you are cha  
rged,  
10 and the alternates, too, you are charged just with turn  
ing  
11 the channel or flipping the page. All the information  
about  
12 the case is the evidence in the case, and that's before  
you.

13 Now, with those instructions said, this is a  
14 typical occurrence. We frequently let juries separate,  
15 deliberating jurors, and then return on the following d  
ay.  
16 It happens all the time. My best advice to you now is  
since  
17 you can't talk about it, just put these things out of y  
our  
18 mind, get a good night's sleep, come back tomorrow morn  
ing,

g. 19 I'll answer the questions and you can go on deliberatin

20 The jury may stand in recess until 9:00 a.m.  
21 tomorrow morning and I'll remain on the bench.

22 THE CLERK: All rise for the jury.

23 (Whereupon the jury left the courtroom at  
24 4:59 p.m.)

r 25 THE COURT: Please be seated. I invite furthe

18

he 1 briefing both as to this knowledge business and as to t  
2 business about a variance or an expansion of the charge  
. I 3 remain on the bench simply to give you tentative answer  
s to 4 these questions, but I won't take argument now because  
ive 5 you're going to get a chance to brief it, but also to g  
6 you my thinking after we separated.

the 7 I really think that Blakely and Booker changed  
8 calculus here, and so citation to these earlier cases I  
9 don't think is particularly helpful.

10 Second --

11 (Whereupon the Court and the Court Reporter  
12 conferred.)

13 THE COURT: I faced in recent months, last year, a  
14 case United States v. Pacheco. He was one of the defendants  
15 in a large drug conspiracy in which the principal defendant  
16 was a fellow by the name of Yeje-Cabrera. I believe I wrote  
17 on this, not that that's significant. The facts are similar  
18 but somewhat different in the sense that I had given a  
19 partial directed verdict and then realized that I had  
20 forgotten a piece of the government's evidence and I took it  
21 away. Nothing changed in the -- well, I won't argue the  
22 case, but appellate counsel, Kimberly Homan, had vigorously  
23 argued both before me and then appealed to the First Circuit  
24 that when I took away the partial directed verdict mid-trial  
25 after jeopardy attached, I had expanded the government's



proof. I simply cite that to you all because it's a place I have told the law clerks to go look, look at the briefs in the court of appeals. It's the last time I touched this variance issue. I resolved against Mr. Pacheco in that case. And I believe I did write on it, and so we're looking that up.

Now, to the specific questions. Subject to your briefing, I would answer under the second charge must both parties to the agreement be knowledgeable about the type of drug for a conviction. Consistent with how I view conspiracy, the answer to that question is yes.

I'm a little unclear about the first one. Is it sufficient for a conviction that only Mr. Hernandez knew what they agreed to import?

Well, on an aiding and abetting theory on Count 1 the answer to that is yes. On a conspiracy charge, they would have to believe that, the answer is no, they would

18 both have to agree to a conspiracy to import either her  
oin  
19 or cocaine. That would have been my answer.

20 I look forward to whatever you tell me and we'  
11

21 recess until nine o'clock tomorrow morning. We'll rece  
ss.

22 (Adjournment.)

23

24

25

20

1 C E R T I F I C A T E

2

3

4 I, Donald E. Womack, Official Court Reporter f  
or

5 the United States District Court for the District of

6 Massachusetts, do hereby certify that the foregoing pag  
es

7 are a true and accurate transcription of my shorthand n  
otes

8 taken in the aforementioned matter to the best of my sk  
ill

9 and ability.

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